1997

State of Utah v. Tommy Glen Carter : Brief of Appellee

Utah Court of Appeals

Attorney for Plaintiff/Appellee; Joanne C. Slotnik; Assistant Attorney General; Simarjit S. Gill; Deputy Salt Lake County Attorney.
Attorney for Defendant/Appellant; Wayne A. Freestone; Parker, Freestone & Angerhofer.

IN THE UTAH COURT OF APPEALS

STATE OF UTAH,	:	
Plaintiff/Appellee,	:	
v.	:	Case No. 970038-CA
TOMMY GLEN CARTER,	:	Priority No. 2
Defendant/Appellant.	:	

BRIEF OF APPELLEE

APPEAL FROM A CONVICTION FOR THEFT FROM A PERSON, A SECOND DEGREE FELONY, IN VIOLATION OF UTAH CODE ANN. § 76-6-404 AND -412 (1996), IN THE THIRD JUDICIAL DISTRICT COURT IN AND FOR SALT LAKE COUNTY, THE HONORABLE KENNETH RIGTRUP, PRESIDING

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BRIEF OF APPELLEE

JURISDICTION AND NATURE OF PROCEEDINGS

This is an appeal from a conviction for theft from a person, a second degree felony. This Court has jurisdiction over the appeal pursuant to Utah Code Ann. § 78-2a-3(2)(f)(1996).

STATEMENT OF THE ISSUE ON APPEAL AND STANDARD OF APPELLATE REVIEW

1. In moving for a continuance, did defendant demonstrate that the testimony of the absent witness was both material and admissible and that he had exercised due diligence in preparing for the case prior to requesting the continuance?

Whether a continuance should be granted or denied is within the sound discretion of the trial court. On appeal, such a decision will not be reversed absent a clear abuse of that discretion. State v. Creviston, 646 P.2d 750, 752 (Utah 1982); State v. Horton, 848 P.2d 708, 714 (Utah App. 1993).

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES

References to constitutional provisions, statutes, or rules are unnecessary to the disposition of this case.

STATEMENT OF THE CASE

Defendant was charged with one count of theft from a person, a second degree felony, for taking money from the person of Joshua Irvin on a downtown Salt Lake City street on June 27, 1996 (R. 3-4). He was tried before a jury, convicted as charged, and sentenced to 1-15 years in the Utah State Prison, with credit for time served. He was also ordered to pay a $500 recoupment fee to the Legal Defender Association and restitution of $13 to the victim, jointly and severally with his co-defendant (R. 109-10). Defendant subsequently filed this timely appeal (R. 111, 113).

STATEMENT OF THE FACTS

The facts are recited in the light most favorable to the jury's verdict. State v. Hamilton, 827 P.2d 232, 233-34 (Utah 1992). Joshua Irvin, the victim in this case, alighted from a bus in downtown Salt Lake, intending to buy a soda before transferring to another bus that would take him home (R. 121, p. 3-4).[1] To that end, he separated the money in his pocket, putting a ten dollar bill and a few one dollar bills in his left

[1] The trial transcript as it appears in the record on appeal compresses six pages of trial transcript into one page of appellate record. To enhance the precision of its citations, the State uses "R" to denote the appellate record citation and "p" to refer to the transcript page within the record citation.

front pocket and the loose change in his right front pocket (Id. at p. 5). As he was walking towards a nearby Circle K store, he felt a bump "on the right side from behind by someone" (Id. at p.6). The bump, which was hard enough to stop him, prompted him to turn towards the individual, either to apologize or to get out of the way (Id.). At that juncture, he stated, "I felt a tug on my pants, turned around and saw that my [left] pocket was being got into" by a second individual (R. 122 at p. 7).

Irvin, both surprised and frightened by these events, yelled something at the two intruders, who trotted away, smiling, in no apparent rush (Id. at pp. 9-10). Defendant shouted back at Irvin something like, "If I had a violin, I'd play it for you right now" (Id. at p. 10). Reluctant to go after the two by himself, Irvin at first decided just to forget the whole incident. On further reflection, however, he realized that he had been victimized and didn't want "to just lay down and let it happen" (Id. at p. 11).

Irvin went to a nearby Travelodge and called 911, describing to the police what the two individuals were wearing (Id. at p. 11-12). While waiting for the police, Irvin felt "antsy," wondering where the two had gone. He went outside the Travelodge and spotted them sitting at the bus station on the grass. Shortly thereafter, two officers on bicycles arrived at the Travelodge (R. 123, p. 14). Irvin described the two men and

pointed them out to the officers, who rode their bikes over to the bus station, where defendant and his companion, Kenneth Ellis, were arrested (R. 130, p. 156; R. 133, p. 73). The arresting officer searched defendant and found a ten dollar bill in his pocket (R. 133, p. 73).[2]

At trial, the jury heard testimony from Joshua Irvin, both officers who responded to Irvin's 911 call, a robbery detective, defendant, Kenneth Ellis, and the Circle K clerk who was on duty that afternoon.

The morning after both sides rested, counsel for Kenneth Ellis moved for a continuance. Ellis's counsel stated that Brian Meek, a jail inmate, had told Ellis that he knew someone named Joshua Irvin who used crystal methamphetamine (R. 165, p. 2 or addendum A). Acting on instructions from the court, Ellis's counsel spoke with Meek and then reported the following information back to the court:

> [Brian Meek] indicated to me that he went to a school [sic] with someone by the name of Joshua Irvin at Cyprus High School. He described the person as being tall. . . . He said that person was between five foot, nine and five foot, ten with long blonde hair. He said he lived in the Magna or West Valley Area. He indicated that he - the person does crystal methamphetamine. . . . He said that

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[2] Defendant, Kenneth Ellis, and a store clerk all testified that defendant and Ellis bought two quarts of beer at the Circle K, which would account for the lack of one dollar bills found on defendant after the search (R. 140, p. 114; R. 145, p. 146; R. 157, p. 215).

> he had actually seen him around it, saw him do it but it has been within the last two years. He hasn't seen him recently. But he knows friends of his who knows [sic] Mr. Irvin much better than Mr. Meek knows him. Additionally, he indicates that one of his friends is owed money for Mr. Irvin for drugs.

(R. 165, p. 2-3). On the basis of this information, Ellis's counsel requested a continuance. The court denied the motion (R. 165, p. 4). Subsequently, the jury convicted defendant as charged (R. 109-10).

SUMMARY OF ARGUMENT

The trial court did not abuse its discretion in denying defendant's motion for a continuance because defendant did not demonstrate that he met the standard required for the grant of such a motion. First, he failed to carry his burden of showing that the testimony of the absent witness was material because he did not even establish that the victim was, in fact, the person whom the absent witness claimed to know. Second, he failed to establish that the testimony would have been admissible pursuant to rule 608(b) of the Utah Rules of Evidence. And third, the record does not reveal any indication that defendant used due diligence to seek out any other witnesses who could have corroborated defendant's version of the relevant events.

ARGUMENT

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DENYING DEFENDANT'S MOTION FOR A CONTINUANCE BECAUSE DEFENDANT FAILED TO CARRY HIS BURDEN OF DEMONSTRATING THAT THE TESTIMONY OF THE ABSENT WITNESS WAS BOTH MATERIAL AND ADMISSIBLE AND THAT COUNSEL HAD EXERCISED DUE DILIGENCE IN PREPARING THE CASE BEFORE REQUESTING THE CONTINUANCE

Defendant claims that the trial court abused its discretion by denying his motion for a continuance of his trial (Br. of App. at 10). He argues that he met the three-prong test for a continuance and that the trial court's refusal to grant his motion prejudiced him by preventing him from eliciting testimony that "may have led to impeachment of Irvin's accusations that the defendant took the money from Irvin's pocket and [Irvin's] claim that he did not use marijuana" (Br. of App. at 6).

A. Waiver

At the outset, one fact requires clarification. Counsel for defendant did not move for a continuance at trial. Only his co-defendant, Ellis, did so (R. 165, p.2 or addendum A). Under these circumstances, it is questionable whether defendant ever preserved this issue for appellate review. Cf. Longo v. State, 580 So.2d 212, 215 (Fla. App. 1991)(failure of defendant to either object himself or join in codefendant's objection waives review of issue on appeal); Brown v. Commonwealth, 780 S.W.2d 627, 629 (Ky. 1989)(where objecting attorney did not make clear

that objection was made on behalf of both codefendants and where other attorney did not join in the objection, the issue is not preserved with respect to the non-objecting defendant); People v. Brown, 110 Cal.App.3d 24, 35 (Cal.Ct.App. 1980)(on appeal, defendant cannot take advantage of objections made by codefendant in absence of stipulation or understanding to that effect).

Here, defendant did not join in Ellis's motion. The only indication that defendant intended to do so was his ambiguous statement, following Ellis's counsel's explanation of what she had learned from Meek, that "I don't have anything to add, your honor" (R. 165, p. 4). This statement could reasonably be interpreted to mean either that defendant intended to join in the motion or that he had no articulable interest in it at all. Cf. State v. Dahlgren, 512 A.2d 906, 913 n.9 (Conn. 1986)(where codefendant alerted trial court in a timely fashion to possibility of error, failure of defendant to fully challenge ruling will not be dispositive).

Furthermore, defendant and Ellis appeared to have incompatible interests. While Ellis was represented by a court-appointed attorney from the Legal Defender Association, defendant's court-appointed LDA attorney had withdrawn because of an unspecified conflict of interest, leaving defendant represented by conflict counsel (R. 34-35). Where interests of co-defendants vary, it is neither logical nor ethically proper

for defendant to rely on a codefendant's pretrial motions. State v. Marahrens, 560 P.2d 1211, 1213 (Ariz. 1977).

B. On the Merits

In any event, the law is well-settled that a decision to grant or deny a continuance lies within the sound discretion of the trial court and will not be disturbed on appeal absent a clear abuse of that discretion. State v. Creviston, 646 P.2d 750, 752 (Utah 1982). It is equally well-settled that the burden is on the moving party to demonstrate that the requirements for granting a continuance have been met. State v. Horton, 848 P.2d 708, 714 (Utah App. 1993). Thus, when a defendant moves for a continuance to procure the testimony of an absent witness, defendant assumes the burden of demonstrating three requirements: "that the testimony is material and admissible, that the witness could actually be procured within a reasonable time, and that due diligence had been exercised before making the request." State v. Williams, 712 P.2d 220, 222 (Utah 1985) (citing State v. Creviston, 646 P.2d at 752); accord State v. Horton, 848 P.2d at 714.

In this case, even assuming arguendo that the objection of Ellis's counsel preserved the issue as to defendant, defendant has failed to demonstrate that the absent witness's testimony was either material to the issue of guilt or admissible under rule 608(b) of the Utah Rules of Evidence. He has further failed to

establish that his counsel used due diligence in attempting to locate other witnesses to corroborate his account.

1. Defendant failed to carry his burden of demonstrating that the absent witness's testimony was both admissible and material.

Defendant argues that the testimony of the absent witness, Brian Meek, was material because it could impeach Joshua Irvin's testimony that he was not a drug user and that he did not approach defendant for the purpose of buying drugs (Br. of App. at 8, 9). In addition, defendant asserts, the testimony could have corroborated defendant's testimony that Irvin approached him to buy drugs (Br. of App. at 8).[3]

Defendant's claim of materiality fails at the outset because of its speculative nature. Indeed, defendant has not even established that the victim in this case was, in fact, the same individual whom Brian Meek claimed to know. Establishing materiality through a positive identification would have been a simple matter. At the very least, counsel could have requested permission to reopen the defense case and could have recalled Joshua Irvin to the stand to ask him whether he attended Cyprus

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[3] In his testimony, defendant had asserted that Joshua Irvin approached him near Crossroads Mall for the purpose of purchasing drugs. To that end, according to defendant, Irvin gave him ten dollars. With Irvin trailing behind, the pair then walked north for several blocks. Along the way, Irvin became angry and afraid that defendant intended to "rip him off." Irvin finally ran off, saying, "I'm going to get you niggers" (R. 145, p. 142-46).

High School, as Brian Meek contended. The answer to that question alone would have helped determine whether there was a true factual nexus between Meek and Irvin. Alternatively, since Brian Meek was housed at the county jail, defense counsel could have requested a short recess so that Meek could be called to the stand to identify Joshua Irvin.[4] In either event, the trial court would have been afforded the opportunity to determine the fundamental materiality of Meek's testimony.[5]

Not only has defendant failed to carry his burden of demonstrating the materiality of Brian Meek's testimony, but he has also failed to demonstrate why such testimony would be admissible. Of relevance to this case, rule 608(b), Utah Rules of Evidence, provides:

> Specific instances of the conduct of a witness, for the purpose of attacking . . . the witness' credibility,. . . may not be proved by extrinsic evidence. They may, however, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness (1) concerning the witness' character

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[4] The State agrees with defendant that the second prong of the continuance standard has been met. That is, the absent witness could plainly be produced within a reasonable amount of time. See, e.g., State v. Horton, 848 P.2d at 714.

[5] For the same reason, any claim of prejudicial error must fail. Absent a demonstrated factual nexus between Meek and Irvin, defendant has failed to carry his burden of showing that he "was materially prejudiced by the court's denial of the continuance or that the trial result would have been different had the continuance been granted." State v. Oliver, 820 P.2d 474, 476 (Utah App. 1991).

for truthfulness or untruthfulness. . . .

According to defense counsel's proffer, Meek was going to testify about specific instances during which he had seen Joshua Irvin use crystal methamphetamine (R. 165).[6] However, rule 608(b) makes clear that this testimony would not have been admissible to impeach Irvin's statements that he did not use illicit drugs and to otherwise attack Irvin's credibility.[7]

State v. Martinez, 848 P.2d 702 (Utah App. 1993), plainly supports this interpretation of the law as applied to these facts. The defendant in Martinez, after engaging in several drug transactions with undercover agents, was charged with distribution of a controlled substance. At trial, undercover agent Anne Burchett testified that she misled defendant into believing that she was a drug user while, in fact, she was not.

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[6] In addition, Meeks was going to testify that Irvin owed one of his friends money for drugs (R. 165). This testimony would be inadmissible hearsay under rules 801(c) and 802, Utah Rules of Evidence. Defendant's suggestion that these statements "would not be excluded under the hearsay rule because both Irvin and the witness [Meeks] can be cross-examined on the testimony" is erroneous. See Appellant's Br. at 8-9. Defendant has ignored the fact that the declarant - the unnamed friend to whom Irvin allegedly owed money - did not testify. Hearsay evidence is inadmissible unless it falls under one of the enumerated exceptions listed in rule 803, none of which apply here.

[7] According to the rule, the proper way for defendant to have impeached Irvin's credibility would have been to question him on cross-examination about the specific instances recounted by Meek during which Irvin allegedly used crystal methamphetamine.

Id. at 704. Defense counsel then proffered that his witness, Steve Farr, would testify that "he knew Burchett during the time she was working the Martinez case, that the two of them used cocaine and marijuana together, and that he observed Burchett 'to be under the influence of drugs in a manner that was impossible and inconsistent with her having only simulated the use of drugs.'" Id. The trial court excluded this testimony under rule 608(b). Id. This Court affirmed, stating that "Farr's testimony would have been extrinsic evidence of specific instances of Burchett's conduct for the purpose of attacking her credibility, which is exactly what Rule 608(b) was designed to exclude." Id.

Just as in Martinez, Brian Meek's testimony in this case would have been inadmissible extrinsic evidence of specific instances of Irvin's conduct, offered for the explicit purpose of attacking Irvin's credibility.[8] "Where the content of the prospective witness' testimony is . . . likely to be inadmissible, it is not an abuse of discretion to deny a continuance." Creviston, 646 P.2d at 752 (citation omitted). Here, where the testimony of Brian Meeks was likely to be inadmissible under rule 608(b) of the Utah Rules of Evidence and

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[8] Furthermore, the testimony had no purpose other than impeachment. Establishing that Irvin was a drug user would not demonstrate that defendant did not commit the crime. "It is not an abuse of discretion to deny a motion for continuance when the testimony sought is only for impeachment purposes" and does not serve to exonerate the defendant. Creviston, 646 P.2d at 753 (citations omitted).

was immaterial as well, the trial court acted within its discretion in denying defendant's motion for a continuance.

2. Defendant has made no showing that he used due diligence in investigating defendant's account of the events.

Defendant has also failed to carry his burden of demonstrating that he exercised due diligence before requesting a continuance. He argues "it was unlikely that *this witness* would have been discovered prior to trial no matter how much due diligence the parties' [sic] exercised" (Br. of App. at 9)(emphasis added). While defense counsel may have been unable to uncover this particular witness prior to trial even if due diligence was used, it is unclear whether defense counsel exercised due diligence to investigate *any* potential witnesses who might have corroborated defendant's story that Joshua Irvin was a drug user.

Because defendant has failed to provide this Court with an adequate record from which to determine that his counsel exercised due diligence, this Court should presume the regularity of the proceedings below, affirming the trial court's denial of defendant's motion for a continuance. See State v. Blubaugh, 904 P.2d 688, 699 (Utah App. 1995) (an appellate court will "assume the regularity of the proceedings below when appellant fails to provide an adequate record on appeal") (citation omitted), cert. denied, 913 P.2d 749 (Utah 1996); accord State v. Wulffenstein, 657 P.2d 289, 293 (Utah 1982) (an appellant has "the duty and

responsibility of supporting [his] allegation by an adequate record" and, absent such record, his "assignment of error stands as a unilateral allegation which the review court has no power to determine").

CONCLUSION

For the reasons stated, this Court should affirm defendant's second degree felony conviction for theft from a person.

RESPECTFULLY submitted this 15th day of December, 1997.

JAN GRAHAM
Attorney General

Joanne C. Slotnik

JOANNE C. SLOTNIK
Assistant Attorney General

CERTIFICATE OF MAILING

I hereby certify that two true and accurate copies of the foregoing brief of appellee were mailed first-class, postage prepaid, to Wayne A. Freestone, Parker, Freestone, Angerhoffer & Harding, 50 West 300 South, Suite 900, Salt Lake City, Utah 84101, this 15th day of December, 1997.

Joanne C. Slotnik

Addendum A
Motion for Continuance

IN THE THIRD JUDICIAL DISTRICT COURT FOR
SALT LAKE COUNTY, STATE OF UTAH

* * *

THE STATE OF UTAH,)
Plaintiff,)
-vs-) Case No. 961901340
TOMMY CARTER,) REPORTER'S SUPPLEMENTAL TRANSCRIPT, IN CHAMBERS CONFERENCE, 11-21-96
Defendant.)

BE IT REMEMBERED that on the 21st day of November, 1996, at 10:00 o'clock a.m., this cause came on for trial before the HONORABLE KENNETH RIGTRUP, District Court, without a jury, in the Salt Lake County Courthouse, Salt Lake City, Utah.

A P P E A R A N C E S:

For the State: SIMARJIT SINGH GILL
Attorney at Law

For the Defendant: WAYNE A. FREESTONE

CAT by: CARLTON S. WAY, CSR, RPR

ORIGINAL

FILED DISTRICT COURT
Third Judicial District
JUN 1 8 1997
By S. Ohrin
Deputy Clerk

PROCEEDINGS

THE COURT: Miss Clark, you wanted the convenience of the record?

MS. CLARK: Thank you, Your Honor. This morning at approximately 10:30 I received a note from Mr. Ellis indicating that a person by the name of Brian Meek, who is an inmate at the jail -- he was housed in 1-B-3 at the time this information was brought up and now is in Section 7-B -- is -- was arrested for no insurance, no registration and no seat belt. He overheard some other people in the jail speaking about the victim in this case, or the alleged victim in this case, Joshua Irvin. Mr. Meeks spoke up and said he knew Mr. Irvin and that he had seen him in the past being around crystal methamphetamine and also using crystal methamphetamine.

I received that information, I notified the Court, the Court instructed that I go speak to Mr. Meek. I took my investigator, Patty -- I forgot -- Rodman is her last name, and we both went and spoke with Mr. Meek. He indicated to me that he went to a school with someone by the name of Joshua Irvin at Cyprus High School. He described the person as being tall. I asked him to describe that a little

bit more further. He said that person was between five foot, nine and five foot, ten with long blonde hair. He said he lived in the Magna or West Valley Area. He indicated that he -- the person does crystal methamphetamine. I pressed him on that. He said that he had actually seen him around it, saw him do it but it has been within the last two years. He hasn't seen him recently. But he knows friends of his who knows Mr. Irvin much better than Mr. Meek knows him. Additionally, he indicates that one of his friends is owed money for Mr. Irvin for drugs.

And at this time we would be asking the Court to continue this. Although we have rested, this is new information that may be important to the case; the reason being is Mr. Irvin indicated that he doesn't use drugs in his testimony. He also indicated that -- there was a statement at the preliminary hearing where he -- his usual practice is not to buy drugs from strangers, which if we were to find the person who he owes money to for drugs and he actually went to school together and were friends together, that would impeach that statement that -- he didn't say that he meant that for face value, that he meant it sarcastically. And we'd be asking the Court to give us some time to investigate this

better. And, you know, with this just short notice, we haven't done anything, but I did speak to this Mr. Meek.

THE COURT: Mr. Freestone?

MR. FREESTONE: I don't have anything to add, Your Honor.

THE COURT: The request for continuance is denied.

(End supplemental.)

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